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IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.8, Petitioner Marei von Saher respectfully submits this Supplemental Brief in Support of her Petition for a Writ of Certiorari to bring to the Court's attention new authority not available at the time of Petitioner's last filing that is highly relevant to the Petition and even more clearly demonstrates the need for review by this Court.

On December 10, 2010, the Ninth Circuit Court of Appeals granted rehearing and reversed its prior decision in *Movsesian v. Victoria Versicherung AG*, No. 07-56722, 2010 WL 5028828 (9th Cir. Dec. 10, 2010), a case in which the court considered the constitutionality of Cal. Code Civ. Proc. § 354.4 — a statute that extended the time for victims and their heirs to commence legal actions to recover on insurance claims connected with the Armenian Genocide. At the Ninth Circuit's direction, *Movsesian* and *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. Aug. 19, 2009) (App. 1a-38a), a case in which the court considered the constitutionality of Cal. Code Civ. Proc. § 354.3 — a statute that extended the time for victims and their heirs to bring claims to recover Nazi-looted art — were treated as related cases and argued before the same three-judge panel on the same day.

Decisions in the two cases were handed down nearly simultaneously. The original *Movsesian* decision (which was twice cited by Respondents herein to support their argument in their Brief in Opposition to the Petition for a Writ of Certiorari) found the statute at issue to be unconstitutional because "§ 354.4 conflict[ed] with the Executive Branch's clearly expressed foreign policy," to which the Ninth Circuit gave "preemptive weight."

Movsesian v. Victoria Versicherung AG, 578 F.3d 1052, 1062 (9th Cir. Aug. 20, 2009). The court concluded that the purpose of the statute was "to provide a forum for the victims of the 'Armenian Genocide' and their heirs to seek justice," which it held was "not a permissible state interest" because it "expresse[d] [California's] dissatisfaction with the federal government's chosen foreign policy path." *Id.* at 1062-63. The statute in *Von Saher* was held to be unconstitutional because, although "[t]he statute does not . . . conflict with any current federal policy espoused by the Executive Branch" (App. 19a), it "created a world-wide forum for the resolution of Holocaust restitution claims," which was "not an area of 'traditional state responsibility.'" App. 25a. The Ninth Circuit thus agreed with the District Court's assessment that "§ 354.3 infringes on the national government's exclusive foreign affairs powers." App. 4a.

Both 2009 decisions relied heavily on this Court's opinion in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), but in crucially different ways: in the original *Movsesian* decision, the Ninth Circuit found that an actual conflict with Executive Branch policy preempted § 354.4, but having found no such conflict with § 354.3 in *Von Saher*, the Court focused on the issue of field preemption taken up in *Garamendi* (539 U.S. at 419 n.11). The new *Movsesian* opinion, however, eliminates that distinction.

With the switch of a single vote, the Ninth Circuit has produced a new decision in *Movsesian* that cannot be reconciled with *Von Saher*. Having now decided in *Movsesian*, as it did in *Von Saher*, that there is no actual conflict with federal policy to preempt the California

statute, the Ninth Circuit applied the same test for field preemption from *Garamendi* that it did in *Von Saher*. *Movsesian*, 2010 WL 5028828, at *5. Relying on *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the Movsesian court reversed its earlier decision and found that § 354.4 falls within a traditional area of state interest and would have only an incidental effect on foreign affairs because insurance claims are "garden variety property claims," not war injuries. *Movsesian*, 2010 WL 5028828, at *5-6. Although § 354.4 permits lawsuits to be brought against insurance companies if they wrote insurance policies in Europe or Asia from 1875 to 1923, so long as traditional standards for jurisdiction are met, the Ninth Circuit now concludes that the statute is constitutional. *Movsesian*, 2010 WL 5028828, at *5. On the other hand, in *Von Saher*, the Ninth Circuit rejected Petitioner's reliance on *Alperin* because there was a statute at issue in *Von Saher*, something that was not present in *Alperin*. App. 27a-28a. The Ninth Circuit has obviously reversed itself on that point in *Movsesian*.

In sum, the two decisions have applied the same legal precedent from footnote 11 in *Garamendi* to virtually identical cases but reached opposite conclusions. If there is no constitutional infirmity in extending the statute of limitations with respect to property claims by victims of the Armenian Genocide and their heirs, then it necessarily follows that extending the statute of limitations for property claims by Holocaust victims and their heirs must be constitutional. More importantly, although the inconsistency is readily apparent and is underscored by the new dissenting opinion in *Movsesian*, the *Movsesian* majority opinion

does not even mention *Von Saher* much less attempt to explain why the two cases should be treated radically differently. The handling of the two cases by the Ninth Circuit can only be described as arbitrary and the resulting inconsistency demonstrates that there was a manifest injustice in *Von Saher*.

We submit that the Ninth Circuit's ruling on field preemption in the new *Movsesian* opinion is the correct one. In any event, the inconsistency is further evidence of the difficulties that the *Garamendi* decision has created for the courts and emphasizes the need for this Court to grant the Petition for a Writ of Certiorari in *Von Saher* and clarify these issues. In the alternative, this Court should grant the Petition for a Writ of Certiorari, vacate the Ninth Circuit's ruling in *Von Saher*, and remand the case for reconsideration.

Respectfully submitted,

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